No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF GEORGIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131 to 12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, as applied to the administration of prison systems.

PARTIES TO THE PROCEEDINGS

The petitioner in this Court is the United States of America. The United States intervened in the court of appeals, pursuant to 28 U.S.C. 2403, to defend the constitutionality of the abrogation of Eleventh Amendment immunity in Title II of the Americans with Disabilities Act.

The respondents are the State of Georgia; the Georgia Department of Corrections; Johnny Sikes, the Georgia State Prison Warden; J. Wayne Garner, the Commissioner of the Georgia Department of Corrections; A.G. Thomas, the Director of Facilities Division of the Georgia Department of Corrections; J. Brady, the Deputy Warden of the Georgia State Prison; O. T. Ray, the supervisor of guard shifts at the Georgia State Prison; H. Whimbly, a guard at the Georgia State Prison; Margaret Patterson, a guard at the Georgia State Prison, and R. King, a staff member at the Georgia State Prison, all of whom were defendants below.

The private plaintiff below, Tony Goodman, is also a respondent. He has filed his own petition for a writ of certiorari in this case. *Goodman* v. *Georgia* (filed March 9, 2005).

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-22a) is unreported. The opinion of the district court (App., *infra*, 23a- 27a) is unreported.

JURISDICTION

The court of appeals entered its judgment on September 16, 2004. A petition for rehearing was denied on December 9, 2004 (App., *infra*, 29a-30a). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced at App., *infra*, 31a-84a.

STATEMENT

1. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, established a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). Congress found that, "historically, society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination * * * continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2). Congress specifically found that discrimination against persons with disabilities "persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3). In addition, Congress found that persons with disabilities

> continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities.

42 U.S.C. 12101(a)(5). Congress concluded that persons with disabilities

> have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.

42 U.S.C. 12101(a)(7). Based on those findings, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment" to enact the Disabilities Act. 42 U.S.C. 12101(b)(4).

The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities in the operation of public services, programs, and activities, including transportation; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities.

This case arises under Title II of the Disabilities Act, which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is defined to include "any State or local government" and its components. 42 U.S.C. 12131(1)(A) and (B). This Court has already held that Title II applies to state prisons. *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206 (1998). Title II may be enforced through private suits,

42 U.S.C. 12133, and Congress expressly abrogated the States' Eleventh Amendment immunity to suit in federal court, 42 U.S.C. 12202.

Title II prohibits governments from, among other things, denying a benefit to a qualified individual with a disability because of his disability, providing him with a lesser benefit than is given to others, or limiting his enjoyment of the rights and benefits provided to the public at large. See 28 C.F.R. 35.130(b)(1)(i), (iii) and (vii).[1] In addition, a public entity must make reasonable modifications in its policies, practices, or procedures if necessary to avoid the exclusion of individuals with disabilities, unless the accommodation would impose an undue financial or administrative burden on the government, or would fundamentally alter the nature of the service. See 28 C.F.R. 35.130(b)(7). The Disabilities Act does not normally require a public entity to make its existing physical facilities accessible. 28 C.F.R. 35.150(a)(1). Public entities need only ensure that "each service, program or activity, * * * when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.150(a). However, building construction or alterations undertaken after Title II's effective date must be designed to provide accessibility. 28 C.F.R. 35.151.

2. Due to multiple spinal fractures, Tony Goodman is a paraplegic and is confined to a wheelchair. He is incarcerated in a Georgia state prison. App., *infra*, 2a. Goodman has been housed in a "high/maximum security section" of the prison, where he has been kept in a cell

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[1] Congress instructed the Attorney General to issue regulations to implement Title II, based on regulations previously promulgated under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (2000 & Supp. I 2001). See 42 U.S.C. 12134.

measuring 12 feet by 3 feet for 23 to 24 hours per day. *Id.* at 4a. He his been housed in that unit, in part, because of "the special requirements associated with his being wheelchair bound." *Ibid.*; see also *ibid.* ("[T]he size of his cell appear[s] to be unrelated to disciplinary issues."). The small size of the cell has prevented Goodman from turning his wheelchair around, thereby rendering him functionally immobile for 23 to 24 hours every day. *Id.* at 4a-5a, 17a. The complaint further alleges that the prison "lacks facilities for the disabled for hygiene, drinking and performing body excretion functions." *Id.* at 4a. More specifically, Goodman has been unable to access his bed, his toilet, or the shower without assistance, and that assistance is often denied to him. *Id.* at 5a. As a result, Goodman has been "forced to live in a cell where the floor was smeared with defecation and urine" and "'required to live and sit in his own body waste,' while being refused repeated requests for cleaning supplies and assistance." *Id.* at 6a; see *id.* at 5a (Goodman "has been forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him.").

Goodman has also been deprived for "long periods" of time of such basic humanitarian needs as "showers, baths, adequate ventilation or heating, recreation, work, medical and [mental health] care, laundry service, cleaning service, and phone service." App., *infra*, 5a. The lack of wheelchair accessibility also has prevented him from exercising the same religious rights as other prisoners, has precluded his use of the prison's law library, and has deprived him of the counseling services, educational services, vocational training, and freedom of movement throughout the institution afforded other inmates. *Id.* at 6a, 24a.

On numerous occasions, the prison's failure to provide accommodations for Goodman's disability have caused him serious physical injury. Goodman has fallen several times while attempting to use the inaccessible toilet, resulting in injuries such as broken toes, "crushed" knees, and a fall-induced epileptic seizure. App., *infra*, 6a. Attempts to use the prison's inaccessible shower have resulted in injuries to Goodman's head, neck, and arm. *Id.* at 7a. In addition, when Goodman was transported in a vehicle that was not wheelchair-accessible, he "fell to the floor and lost consciousness several times." *Ibid.* The complaint further asserts that Goodman was purposefully denied adequate medical care after many of those incidents. *Id.* at 7a-8a.

After repeated unsuccessful attempts to obtain relief through the prison's administrative grievance process, Goodman filed suit, pro se, against the Georgia Department of Corrections and numerous prison officials (collectively, "Georgia"), seeking declaratory, injunctive, and monetary relief. App., *infra*, 2a-3a.[2] The district dismissed Goodman's claims against the State and the Georgia Department of Corrections on Eleventh Amendment grounds and dismissed the claims for injunctive relief against individual officers on mootness grounds based on Goodman's transfer to another prison. *Id.* at 23a-27a.

3. Goodman appealed, and the United States intervened to defend the constitutionality of Title II's abrogation of Eleventh Amendment immunity. While the appeal was pending, this Court issued its decision in

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[2] The complaint also included damages claims against the prison officials in their individual capacities for violations of Goodman's constitutional rights, pursuant to 42 U.S.C. 1983. App., *infra*, 9a-10a.

Tennessee v. *Lane*, 124 S. Ct. 1978 (2004). In *Lane*, the Court upheld, as legislation validly enacted pursuant to Congress's legislative authority under Section 5 of the Fourteenth Amendment, Title II's abrogation of the States' Eleventh Amendment immunity for the class of cases implicating the accessibility of judicial services. *Id.* at 1993. In so holding, this Court found it unnecessary to address Congress's power to enact Title II pursuant to its Section 5 power "as an undifferentiated whole." *Id.* at 1992. Instead, the Court decided only whether Title II is an appropriate remedy with respect to the area of governmental services implicated by the type of case at hand. *Id.* at 1992-1993. Following *Lane*, the United States and the other parties submitted supplemental briefs addressing the application of *Lane* to the administration of prisons.

The court of appeals subsequently affirmed the district court's dismissal of Goodman's claims against the State and the Department of Corrections on Eleventh Amendment grounds. App., *infra*, 1a-22a. In so holding, the court of appeals applied its recent decision in *Miller* v. *King*, 384 F.3d 1248 (2004), in which the court had held that Title II is not valid Section 5 legislation as applied to the administration of penal systems. In *Miller*, the court read the relevant context for analyzing Congress's exercise of its Section 5 power under *Tennessee* v. *Lane* to be the particular constitutional right allegedly violated in the individual plaintiff's case—which, in Miller's case, was the Eighth Amendment. *Id.* at 1272. The court expressly refused to consider "the host of [additional] rights identified by the United States" as enforced by Title II in the prison context because it did not consider them to be "implicate[d]" by Miller's individual claims (notwithstand-

ing their assertion by the United States as intervenor). *Id.* at 1272 n.28.

Having restricted the relevant constitutional context to the Eighth Amendment, the *Miller* court then concluded that Title II sweeps too broadly in the prison context because it proscribes "a different swath of conduct that is far broader and even totally unrelated to the Eighth Amendment in many instances," such as equal access to other prison programs that might implicate different constitutional rights. 384 F.3d at 1274. The court reasoned that, "[e]ven if a documented history of disability discrimination specifically in the prison context justifies application of some congressional prophylactic legislation to state prisons," "this case [is] radically different from *Lane*" because of "the limited nature of the constitutional right at issue." *Id.* at 1273. The court further concluded that Title II "substantively rewrites the Eighth Amendment" because it may require States to allow "qualified, disabled prisoners" to "participate in a broad array of services, programs, and activities" already offered to non-disabled prisoners. *Id.* at 1275 n.33.

In the case at hand, the Eleventh Circuit extended *Miller*'s holding that Title II is not valid Section 5 legislation to Goodman's case, App., *infra*, 19a, notwithstanding that Goodman's complaint presented claims implicating not just the Eighth Amendment, but also the First, Fifth, and Sixth Amendments, *id.* at 2a-8a, 23a-24a. The court subsequently denied the United States' petition for rehearing and rehearing en banc.[3]

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[3] The United States' separate petition for rehearing and rehearing en banc in the *Miller* case remains pending.

REASONS FOR GRANTING THE PETITION

The court of appeals has held an Act of Congress to be unconstitutional in an important area of its application and, in so doing, has departed sharply from the analytical framework prescribed by this Court in *Tennessee* v. *Lane*, 124 S. Ct. 1978 (2004). The court of appeals' decision, moreover, is in conflict with a recent ruling of the Ninth Circuit upholding the constitutionality of Title II's abrogation of Eleventh Amendment immunity in the context of the administration of prisons. As a result, the scope of federal civil rights legislation that is designed "to provide a clear and comprehensive national mandate for the elimination of [all] discrimination" against persons with disabilities, 42 U.S.C. 12101(b)(1), and, concomitantly, the extent of constitutional immunity enjoyed by States, now vary depending upon where the Title II lawsuit is filed. The court of appeals' denial of the United States' petition for rehearing en banc signifies that the conflict in the circuits needs to be resolved by this Court.

1. This Court's review is warranted because the holding of the Eleventh Circuit squarely conflicts with the Ninth Circuit's decision in *Phiffer* v. *Columbia River Correctional Institute*, 384 F.3d 791 (2004), petition for cert. pending, No. 04-947 (filed Jan. 11, 2005). Five days after the Eleventh Circuit ruled in the instant case that Title II's abrogation of Eleventh Amendment immunity is unconstitutional in the context of prison administration, the Ninth Circuit issued an amended opinion in *Phiffer* upholding the constitutionality of Title II's abrogation in the prison context as

"consistent with *Lane*'s holding." *Id.* at 792.[4] Moreover, the *Phiffer* court upheld Title II's abrogation broadly, without reference to the particular constitutional rights identified by the individual plaintiff, *id.* at 792-793. That mode of analysis stands in sharp contrast to the Eleventh Circuit's plaintiff-specific articulation of the relevant context for assessing whether Title II is an appropriate response to the pattern of "unconstitutional discrimination against persons with disabilities in the provision of public services" identified by this Court in *Lane*, 124 S. Ct. at 1991.

As a result, the *federal* protection afforded disabled prisoners and the obligations imposed upon prison administrators as a matter of *federal* law now vary depending upon the state of incarceration. Moreover, the Eleventh Circuit's denial of the United States' petition for rehearing en banc, which called the court's attention to the inter-circuit conflict generated by its decision, leaves little reasonable prospect of the circuit split resolving itself absent intervention by this Court.[5] The operation of critical civil rights legislation like the Americans with Disabilities Act—a nationwide law that

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[4] The original Ninth Circuit opinion was issued the day before the Eleventh Circuit's decision in *Miller*, but was then amended to include a concurrence by Judge O'Scannlain.

[5] Although the United States' petition for rehearing and rehearing en banc remains pending in *Miller* v. *King*, *supra*, which involved the same Eleventh Amendment question presented here, the Eleventh Circuit's denial of rehearing and rehearing en banc in the present case, which relied exclusively upon *Miller* for its holding that Congress lacked the legislative authority to abrogate the States' immunity from suit in the prison context, App., *infra*, 19a, strongly indicates that, whatever the ultimate disposition of the *Miller* petition, it will not affect that aspect of the court's holding pertaining to the scope of Congress's Section 5 power which the *Goodman* panel applied here.

"is designed to address * * * pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *Lane*, 124 S. Ct. at 1989—should not depend on where circuit court boundary lines fall. Yet, as a result of the split between the Ninth and Eleventh Circuits—the two circuits that contain the largest number of incarcerated persons—the federal rights of nearly 30% of all State prisoners nationwide now turn upon geography. See http://www.ojp.usdoj.gov/bjs/pub/pdf/p02.pdf.

Furthermore, the question of Title II's constitutionality in the context of prison administration is currently pending in the Third Circuit, see *Cochran* v. *Pinchak*, No. 02-1047 (argued Oct. 25, 2004), and was recently considered, but not decided, by the Fourth Circuit in *Spencer* v. *Easter*, 109 Fed. Appx. 571 (2004), cert. denied, No. 04-8293 (Mar. 7, 2005). Those cases demonstrate that the issue is a recurring one of national importance and that the inter-circuit division is only going to proliferate. Accordingly, this Court's review is warranted.

2. The court of appeals' decision is flatly inconsistent with this Court's decision in *Tennessee* v. *Lane*, *supra*. In *Lane*, this Court held that Congress's power to enact Title II pursuant to its Section 5 power need not be analyzed "as an undifferentiated whole." 124 S. Ct. at 1992. Instead, this Court addressed whether Title II is an appropriate remedy with respect to the area of governmental services implicated by the case at hand. In *Lane*, the plaintiffs filed suit to enforce the constitutional right of access to the courts. *Id.* at 1982-1983, 1993. The Court accordingly addressed whether Title II is valid Section 5 legislation "as it applies to the

class of cases implicating the accessibility of judicial services." *Id.* at 1993.[6]

In so holding, however, this Court did not confine itself to the particular factual problem of access to the courts presented by the individual plaintiffs, nor did it limit its analysis to the specific constitutional interests entrenched upon in the particular case. Both of the plaintiffs in *Lane* were paraplegics who use wheelchairs for mobility and who were denied physical access to and the services of the state court system because of their disabilities. Plaintiff Lane alleged that, when he was physically unable to appear to answer criminal charges because the courthouse was inaccessible, he was arrested and jailed for failure to appear. Plaintiff Jones, a certified court reporter, alleged that she could not work because she could not gain access to a number of county courthouses. 124 S. Ct. at 1982-1983. Lane's particular claims thus implicated his rights under the Due Process and Confrontation Clauses, and Jones's claims implicated only her rights under the Equal Protection Clause.

In analyzing Congress's power to enact Title II, however, this Court discussed the full range of constitutional rights implicated by the "accessibility of judicial services," *Lane*, 124 S. Ct. at 1993:

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[6] For the reasons stated in the United States' brief in *Lane*, Title II is valid Section 5 legislation in its entirety because it is a congruent and proportional means of remedying historic and enduring unconstitutional treatment of individuals with disabilities by government actors and preventing future unconstitutional discrimination, which *Lane* expressly held were "appropriate subject[s] for prophylactic legislation" under Section 5. 124 S. Ct. at 1992.

> The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant such as respondent Lane the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." The Due Process Clause also requires the States to afford certain civil litigants a "meaningful opportunity to be heard" by removing obstacles to their full participation in judicial proceedings. We have held that the Sixth Amendment guarantees to criminal defendants the right to trial by a jury composed of a fair cross section of the community, noting that the exclusion of "identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial." And, finally, we have recognized that members of the public have a right of access to criminal proceedings secured by the First Amendment.

Id. at 1988 (citations omitted); see also *id.* at 1990 n.14 (considering cases involving the denial of interpretive services to deaf defendants and the exclusion of blind and hearing impaired persons from jury duty).

Thus, a number of the constitutional rights that this Court found relevant to its analysis in *Lane* were not pressed by the plaintiffs or directly implicated by the facts of their case. For instance, neither Lane nor Jones alleged that he or she was unable to participate in jury service or was subjected to a jury trial that excluded persons with disabilities from jury service. Similarly, neither Lane nor Jones was prevented by disability from participating in any civil litigation, nor did either allege a violation of First Amendment rights.

The facts of their cases also did not implicate Title II's requirement that government, in the administration of justice, provide "aides to assist persons with disabilities in accessing services," such as sign language interpreters or materials in Braille, *id.* at 1993, yet this Court broadly considered the full range of constitutional rights and Title II remedies potentially at issue, framing its analysis in terms of the broad "*class of cases* implicating the accessibility of judicial services." *Ibid.* (emphasis added).

That categorical approach—rather than the Eleventh Circuit's litigant-specific mode of analysis—makes sense. Congress is a national legislature and in legislating generally, and pursuant to its prophylactic and remedial Section 5 power in particular, Congress necessarily responds not to the isolated claims of individual litigants, but to broad patterns of unconstitutional conduct by government officials in the substantive areas in which they operate. Indeed, in enacting Title II, Congress specifically found that unconstitutional treatment of individuals with disabilities "persists in such critical *areas* as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services." 42 U.S.C. 12101(a)(3) (emphasis added).

Accordingly, in evaluating whether Title II is an appropriate response to "pervasive unequal treatment in the administration of state services and programs," *Lane*, 124 S. Ct. at 1989, this Court's decision in *Lane* directs courts to consider the entire "class of cases" arising from the type of governmental operations implicated by the lawsuit, *id.* at 1993. Just as this Court upheld Title II's application in *Lane* by comprehensively considering Title II's enforcement of all the

constitutional rights and Title II remedies potentially at issue in the entire "class of cases implicating the accessibility of judicial services," *ibid.*, the court of appeals here should have assessed Title II's constitutionality as applied to the entire "class of cases," *ibid.*, implicating, in this Court's words, "the administration of * * * the penal system," *id.* at 1989.

Those constitutional interests and the Title II remedies they trigger include not just the Eighth Amendment claim presented in *Miller*, but also the widespread pattern of unequal treatment of prisoners with disabilities documented in the legislative history of Title II. That evidence includes numerous claims, like Goodman's, asserting (i) the denial of equal access to religious services, law libraries, telephone and mail services, medical treatment, and rehabilitation, recreation, and work programs; (ii) the unconstitutional imposition (as in Goodman's case) of disparate terms of confinement and restraint solely because of the individuals' disabilities; and (iii) the infliction of degrading, inhumane, and life-threatening conditions on disabled prisoners nationwide. Those claims arise under not just the Eighth Amendment, but also the Fourteenth Amendment's Due Process and Equal Protection Clauses, and the First, Fifth, and Sixth Amendments, as applied to the States through the Fourteenth Amendment. See, *e.g.*, U.S. Br. at 30, 34 & n.27, Apps. A and C, *Tennessee* v. *Lane*, No. 02-1667, *supra*; *Board of Trs. of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 391-424 (2001) (Breyer, J., dissenting); *Miller*, 384 F.3d at 1262 n.12; see also *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206, 211-212 (1998) (noting that the Disabilities Act's findings about "discrimination 'in such critical areas as * * * institutionalization,' can be

thought to include penal institutions") (citation omitted).

When viewed through the analytical framework established and applied by this Court in *Lane* and the "sheer volume of evidence" compiled by Congress, *Lane*, 124 S. Ct. at 1991, "Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating" "administration of * * * the penal system," *id.* at 1989, 1993.

3. The Eleventh Circuit's departure from this Court's precedent and creation of an inter-circuit conflict merits this Court's review at this time. First, the court of appeals has declared part of an Act of Congress—a law that is a civil rights "milestone," *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring)—to be unconstitutional and unenforceable in significant respects within its jurisdiction. See also *Miller*, 384 F.3d at 1268 n.23 (questioning Congress's substantive authority to impose Title II on prisons under the Commerce Clause). That is "the gravest and most delicate duty" that courts are "called upon to perform," *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) (quoting *Blodgett* v. *Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)), and thus warrants this Court's review in its own right.

Second, the court of appeals cemented an inter-circuit conflict through its denial of rehearing en banc. The circuits are now divided on the question whether Title II of the Disabilities Act validly abrogates Eleventh Amendment immunity in the prison context. Time will only increase, not ameliorate, the division in the circuits.

Third, the legal question presented and the circuit conflict reach beyond the particular prison context implicated here. The Eleventh Circuit's departure

from the mode of constitutional analysis developed by this Court in *Lane* for identifying the relevant as-applied context will govern its evaluation of Title II's constitutionality in all of its future applications. The Ninth Circuit, for its part, has now indicated that it will follow its categorical approach when consistent with *Lane* in other contexts. There are weighty interests at stake on both sides of the balance—the interests of individuals with disabilities in the prevention and remediation of "pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights," *Lane*, 124 S. Ct. at 1989, and the States' interest in vindicating any federalism-based right not to be subjected to litigation in the first instance. Given the gravity of those interests, tolerating years of misfocused litigation and the misdirected consumption of scarce judicial and governmental resources would not be consonant with either the purposes of Title II or the federalism principles embodied in the Eleventh Amendment. Delay is particularly inappropriate in the context of prison administration because, as this case illustrates, Title II's operation in that setting not infrequently redresses the inhumane, degrading, and health-endangering conditions of daily living for inmates.

Finally, this case is the proper vehicle for consideration of the question presented. While a petition for a writ of certiorari seeking, *inter alia*, review of the same question was recently filed in the Ninth Circuit case, *Columbia River Correctional Institute* v. *Phiffer*, No. 04-947, that case provides a less optimal vehicle. In *Phiffer*, neither the parties nor the lower courts notified the United States that a challenge to Title II's constitutionality was pending and, as a result, the United States did not participate in that case in defense

of Title II below. More importantly, in *Phiffer*, resolution of the question of Congress's power to enact Title II pursuant to its Section 5 power in the prison context ultimately will have no effect at all on the States' liability to suit or for damages in that case. That is because the relief awarded against the State in *Phiffer* is independently supported by Section 504 of the Rehabilitation Act. In addition to pursuing claims under Title II, the plaintiff in *Phiffer* has pursued separate claims under Section 504 of the Rehabilitation Act, 29 U.S.C. 794. In cases where it applies (*i.e.*, where the relevant State agency receives federal funding), the Rehabilitation Act provides the exact same remedies for the exact same triggering conduct as Title II. See 42 U.S.C. 12133 (providing that the remedies under Section 504 "shall be the remedies * * * this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the Disabilities Act).

There is no dispute that the defendants in *Phiffer* receive federal funding, which renders them liable under Section 504, and, in fact, the liability determination in the case was premised on both Title II and Section 504. See *Phiffer*, 384 F.3d at 792-793. This Court has repeatedly denied petitions for writs of certiorari seeking to invalidate Section 504's provision conditioning receipt of federal funds on a waiver of the State's immunity. See, *e.g.*, *Kansas* v. *Robinson*, 539 U.S. 926 (2003) (No. 02-1314); *Pennsylvania Dep't of Corrs.* v. *Kowslow*, 537 U.S. 1232 (2003) (No. 02-801); *Chandler* v. *Lovell*, 537 U.S. 1105 (2003) (No. 02-545); *Hawaii* v. *Vinson*, 537 U.S. 1104 (2003) (No. 01-1878); *Ohio Envtl. Prot. Agency* v. *Nihiser*, 536 U.S. 922 (2002) (No. 01-1357); *Arkansas Dep't of Educ.* v. *Jim C.*, 533 U.S. 949 (2001) (No. 00-1488).

The Court's resources would be better expended addressing the constitutionality of Title II's abrogation of Eleventh Amendment immunity in a case where the answer to that question will have some discernible impact on the litigation. Here, Goodman has not pursued a Section 504 claim and therefore his claim for relief against the State will turn on the extent to which Title II validly abrogates the State's immunity. In the alternative, the Court could grant both this petition and the *Phiffer* petition and consolidate the cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

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MARCH 2005

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168
D.C. Docket No. 99-00012-CV-JEG-6

TONY GOODMAN, PLAINTIFF-APPELLANT

v.

O.T. RAY, ET AL., DEFENDANTS

THE STATE OF GEORGIA, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, INTERVENOR

Appeal from the United States District Court
for the Southern District of Georgia

[Filed: Sept. 16, 2004]

OPINION

Before: CARNES, HULL and HILL, Circuit Judges.

HULL, Circuit Judge:

Plaintiff Tony Goodman, a paraplegic state prisoner, appeals (1) the dismissal of his Eighth-Amendment claims brought under 42 U.S.C. § 1983, and (2) the grant of summary judgment on his disability-discrimination claims brought under Title II of the Americans with Disabilities Act, 42 U.S.C. §§ 12131, *et seq.* ("ADA").

After review and oral argument, we: (1) reverse, in part, the district court's dismissal of Goodman's Eighth-Amendment claims for monetary and injunctive relief under § 1983; (2) reverse the magistrate judge's grant of summary judgment for the defendants on Goodman's ADA claims for injunctive relief; and (3) affirm the grant of summary judgment for all defendants with regard to Goodman's ADA claims for monetary damages under Title II of the ADA. We further order that Goodman be allowed an opportunity to amend and streamline his complaint as to his Eighth-Amendment claims and his ADA claims under Title II for injunctive relief.

I. FACTUAL BACKGROUND

According to the medical evidence in the record, Goodman was involved in an automobile accident in 1992, which left him unable to walk. Goodman is a wheelchair-dependent paraplegic, whose injuries include multiple spinal fractures.

In 1995, Goodman was convicted of aggravated assault, possession of a firearm by a convicted felon, and possession of cocaine with intent to distribute. On June 18, 1996, Goodman was transferred to Georgia State Prison ("GSP"), in Reidsville, Georgia. Goodman's complaint concerns his stay at GSP.

A. Complaint

After filing numerous administrative grievances with prison officials regarding the conditions of confinement at GSP, Goodman filed this federal suit claiming, *inter alia*, violations of the Eighth Amendment and Title II of the ADA. Goodman's *pro se* complaint names the following defendants: (1) the Georgia Department of

Corrections ("GDOC"); (2) the State of Georgia;[1] (3) J. Wayne Garner, the Commissioner of the GDOC; (4) A.G. Thomas, Director of Facilities Division of the GDOC; (5) Johnny Sikes, Warden of GSP; (6) J. Brady, Deputy Warden of GSP; (7) O.T. Ray, supervisor of guard shifts at GSP; (8) H. Whimbly, guard at GSP; (9) Margaret Patterson, guard at GSP; and (10) R. King, staff member at GSP. Goodman's complaint alleges, *inter alia*, that the defendants, in their individual and official capacities, were deliberately indifferent to his (1) serious medical needs and (2) conditions of confinement at GSP, in violation of the Eighth Amendment. Goodman sought monetary damages.

Goodman further claims that the defendants discriminated against him on the basis of his disability in violation of Title II of the ADA. Goodman sought both injunctive relief and monetary damages on his ADA claims.[2]

Because we are reviewing the dismissal of Goodman's Eighth-Amendment claims, we outline the factual allegations in his complaint, assuming all allegations to be true. *Cottone* v. *Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003) ("In reviewing a complaint, we accept all well-pleaded factual allegations as true and construe the facts in the light most favorable to the plaintiff.").

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[1] Goodman did not originally name the State of Georgia as a defendant, but after reviewing the complaint, the magistrate judge recommended that the State of Georgia be joined as a defendant to Goodman's ADA claims. As noted later, the proper defendant on Goodman's ADA claims for injunctive relief is actually Warden Johnny Sikes, in his official capacity.

[2] Goodman's complaint specifically prayed for attorney's fees, declaratory and injunctive relief, and punitive and compensatory damages in the amount of $600,000 from each individual defendant.

B. Conditions at GSP

Goodman is housed in a high/maximum security section of GSP, the K-Building. Prison officials claim that Goodman "was assigned to . . . the Special Management Unit [K-Building] both because of his continuous disruptive conduct and the special requirements associated with his being wheelchair bound."

Goodman is kept in his "K-1 unit" cell, measuring twelve-feet long by three-feet wide, for twenty-three to twenty-four hours per day. While Goodman has had some disciplinary problems in the past, Goodman's allegations about the size of his cell appear to be unrelated to disciplinary issues. Instead, this is apparently the size of his cell whether or not he is in disciplinary isolation.[3]

According to Goodman, GSP does not provide reasonable accommodations for his paraplegia. Specifically, Goodman claims that the prison "lacks facilities for the disabled for hygiene, drinking and performing body excretion functions" and that GSP "is in a serious state of disrepair and fail[s] to meet minimal health and safety needs of the Plaintiff."

Beyond the inadequate prison conditions, Goodman claims that he has been denied access to "services, programs, and activities" at GSP by the defendants because of his disability. Specifically, Goodman states that the defendants have discriminated against him, based on his disability, because they have "refused and/or denied and/or excluded him from participation in

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[3] In a declaration attached to a motion for a TRO, Goodman avers that he once was in solitary confinement for forty-two straight days.

MH/MR services, programs, and activities of the prison."

Further, Goodman claims that he "could be more appropriately treated in [a] more integrated community setting," and that his continued confinement in the "segregated environment" is "unlawful disability-based discrimination." In this regard, Goodman also contends that the classification procedures for the prison are inadequate because "a substantial number of prisoner[s] . . . are placed in maximum custody, when lesser degrees of custody would suffice." Goodman states that the classification procedures are inadequate because "there are insufficient staff members to give adequate time to each case, and staff members are inadequately trained."

Goodman provides numerous examples of the manner in which the prison conditions at GSP are inadequate for the disabled. Specifically, Goodman claims that he is unable to turn his wheelchair around inside of his twelve-foot-by-three-foot cell, and, thus is virtually immobile. Goodman also alleges that he is unable to use his toilet, his bed, or the shower without assistance, and that the GSP prison officials or guards do not provide him with assistance. In fact, according to Goodman, he has been forced to sit in his own bodily waste for long periods of time because none of the guards was willing to assist him.

In his complaint, Goodman also states that he has suffered "long periods of deprivation of basic amenities," such as "showers, baths, adequate ventilation or heating, recreation, work, medical and MH/MR care, laundry service, cleaning service, and phone service." Furthermore, Goodman states that he does not have access to the windows of his cell, the wall electrical

plugs of his cell, and that GSP does not have wheelchair-accessible routes or rooms throughout the prison. Goodman also details the programs he has been denied access to, including: "counseling services, educational services, college program, vocational training, recreation activities, freedom of movement in the unit and institution, television, phone calls, entertainment, and religious rights."

C. Specific Instances of Injury

According to Goodman, there have been instances in which he was injured trying to use the toilet or the shower because the toilets and the showers do not have supports for disabled prisoners, and the prison staff did not provide him the necessary assistance. For example, Goodman states that on August 26, 1998, he had to "hurl" himself from his wheelchair onto the toilet, and that the toilet seat was not stabilized or secure. When he tried to return to his wheelchair from the toilet, Goodman states that he "slipped and fell onto the floor causing an epileptic seizure, and . . . [he] broke his right toe and crushed his right knee."

Goodman claims that, on May 12, 1999, he "had a [bowel movement] and urine, on himself," and that he requested cleaning supplies from "S.M.U. Capt. Mr. Brown, Mr. Smith, and Mr. Hall," and assistance in cleaning his wheelchair and cell, but all of them refused. He states that he was "forced to live in a cell where the floor was smeared with defecation and urine . . . . He was required to live and sit in his own body waste," while being refused repeated requests for cleaning supplies and assistance.

Goodman claims that, on May 14, 1999, he "broke his left foot and crushed his left knee," while trying to

transfer himself to the toilet from his wheelchair. Goodman alleges that Captain Brown denied his requests for help cleaning his cell and for medical care.

Goodman also describes how he was harmed in the showering facility at GSP because it was without adequate support for prisoners with disabilities. On April 8, 1998, Goodman states that "C.O. II Whimbly took a toilet seat into the shower for the Plaintiff to sit on while showering, but the toilet seat is not accessible. Plaintiff was trying to transfer from his [wheelchair] to the toilet chair but the toilet seat turned over and he fell to the floor and was hurt at [the] head, neck, [and] left arm."[4] Goodman also claims that he was denied adequate medical care following this incident.

Goodman further claims that the prison officials have not taken appropriate measures to safely transport inmates with disabilities. Goodman describes one occasion in which he was transferred from GSP to the federal court building in Atlanta, Georgia, in a vehicle that was not equipped for wheelchair-bound passengers. Specifically, Goodman states that on May 5, 1998, he was "forced to ride handcuffed and shackled in the back of a van without seatbelts or restraints," and that "the seat which he was seated in was not stabiled [sic] or secure." As a result, Goodman states that he "fell to the floor and lost consciousness several times," and that he "suffer[ed] injures [sic] and pains at head, neck, back, stomach and legs." Goodman also states that upon his return, he made a request to Officer Hays, and

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[4] It appears that Goodman is occasionally given a "toilet set" while in the shower, but that he cannot reach the seat of the toilet set without assistance.

R. Smith "to see someone from medical . . . but medical refused to see or examine [him]."

In addition to Goodman's allegations that the defendants have purposefully denied him medical treatment, Goodman states that he has been denied catheters and rehabilitative therapy. He also claims that he has an asthma and a bronchitis condition that are aggravated by the air quality of his cell. Despite his requests for a change, the air in Goodman's cell is heated in the summer with high humidity and little ventilation and cooled in the winter, and Goodman has "a very hard time trying to breath [*sic*] inside of [the] cell." Finally, Goodman claims that the defendants have failed "to provide any assistance in preventing dangerous bedsores," and that he has been denied appointments with mental-health counselors, despite making numerous requests. In fact, Goodman asserts that he was forced to live under inhumane conditions; namely, in his cell without clothing under very cold temperatures.

With regard to these allegations, Goodman claims that GSP officials—Warden Sikes, Deputy Warden Brady, Supervisor Ray, Dr. Lowry, Dr. Mailloux, Barbara Werth, L. Waters, J. Bradford, J. Paris, and Lynn O. Smith—"had knowledge and notice that [Goodman] was not secured, safe or stabilized in this cell," and that "despite this knowledge of his precarious and perilous placement within the prison cell the above named agents proceeded to house him in a prison cell which was in total disregard of his health, safety and well-being."

D. Dismissal of Goodman § 1983 Claims

As provided for in 28 U.S.C. § 1915A, the magistrate judge reviewed Goodman's complaint for cognizable claims. With respect to the § 1983 claims, the magistrate judge concluded that Goodman's allegations were vague and constituted insufficient notice pleading under Federal Rule of Civil Procedure 8. Specifically, the magistrate judge stated that Goodman's complaint did not "set forth a short, plain statement of the facts as to each defendant," and was deficient because it did not state "what specific constitutional violations occurred, the specific acts committed by each defendant that resulted in a particular constitutional violation, or on what date these alleged acts occurred." Thus, the magistrate judge recommended that the § 1983 claims against all defendants be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(ii). The magistrate judge alternatively noted that the GDOC, as a state agency, is immune from a § 1983 suit under the Eleventh Amendment.

With respect to Goodman's ADA claims, the magistrate judge stated that his suit against GDOC is actually against both the State of Georgia and the GDOC. The magistrate judge pointed out that the ADA applies to services, programs, and activities of "a public entity," making the State of Georgia a proper defendant for Goodman's ADA claims. Thus, the magistrate judge recommended that the ADA claims be allowed to proceed against the GDOC and that the State of Georgia be joined as a defendant.

Noting that the United States Supreme Court had not addressed the question of whether the application of the ADA to state prisons was a constitutional exercise of Congressional power under the Commerce

Clause or under the Fourteenth Amendment, the magistrate judge determined that Goodman's allegations "arguably stated a colorable claim for relief under 42 U.S.C. § 12131."

On August 20, 1999, the district court, in a one-page order, adopted the magistrate judge's recommendations and dismissed Goodman's § 1983 claims against all defendants and dismissed the ADA claims against all defendants, except for his ADA claims against defendants the GDOC and the State of Georgia. Goodman was not given an opportunity to amend his complaint.

F. Summary Judgment on Goodman's ADA Claims

Following the dismissal of Goodman's § 1983 claims, the parties filed cross motions for summary judgment as to his ADA claims.[5] In support of his summary judgment motion, Goodman attached a statement of undisputed facts and his own and three other inmates' affidavits, which mirrored the allegations in his complaint, including such statements as: (1) Goodman was kept in his small cell in K-Building twenty-three hours per day; (2) Goodman was denied the full range of all privileges and rights to which other inmates in similar security classifications have access; (3) Goodman was denied access to medical care and treatment; (4) the prison was "not properly equipped to secure and house handicapped patients," nor was it wheelchair-

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[5] Throughout the summary-judgment stage, some of the pleadings and orders do not name both defendants State of Georgia and the GDOC. However, we construe those pleading as filed by both defendants and those orders as relating to both defendants because both defendants were the named defendants when the district court ordered that the ADA claims proceed to summary judgment and because both defendants appear on subsequent court documents.

accessible; and (5) Goodman had injured himself on a number of occasions trying to transfer to his cell toilet.

In response, defendants the State of Georgia and the GDOC denied most of Goodman's statement of undisputed facts and disagreed with Goodman's affidavits. The defendants also sought summary judgment with respect to Goodman's ADA claims, arguing that: (1) the State of Georgia had immunity from his ADA claims for monetary damages under the Eleventh Amendment; (2) his ADA claims for injunctive relief were moot; (3) the ADA did not apply to state prisons; (4) his claims failed on the merits; and (5) his claims were foreclosed by the Prison Litigation Reform Act ("PLRA").

On February 10, 2000, the magistrate judge recommended that both motions be denied, determining that: (1) states are not immune to suit brought under the ADA; (2) Goodman's claim for injunctive relief was not moot despite his transfer; and (3) there were issues of fact. The magistrate judge identified the issues of fact, as follows: (1) whether the defendants reasonably accommodated Goodman's disability; (2) whether Goodman was a "qualified individual" under the ADA; and (3) whether Goodman's claim for mental suffering was foreclosed by the PLRA.

On March 6, 2000, the district court adopted the magistrate judge's report and denied Goodman's and the defendants' motions for summary judgment.[6] On June 14, 2001, the parties consented to trial by the magistrate judge. On October 22, 2001, the State of

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[6] Goodman also filed a number of emergency motions for injunctive relief when transferred to different prisons claiming the same violations he alleged in his complaint; all of the motions were denied by the district court.

Georgia and the GDOC again moved for summary judgment based on and due to the then-new Supreme court decision in *Board of Trustees of the University of Alabama, et al.* v. *Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001).

On December 12, 2001, the magistrate judge granted the State of Georgia and the GDOC's joint motion for summary judgment, determining that Goodman's claims for monetary damages under the ADA were precluded by the Eleventh Amendment and that his claims for injunctive relief were rendered moot due to his transfer from GSP to Valdosta State Prison.

Goodman appeals the district court's dismissal of his § 1983 claims and the grant of summary judgment on his ADA claims for monetary damages and injunctive relief.[7]

II. STANDARD OF REVIEW

We review *de novo* the dismissal of a complaint for failure to state a claim under 28 U.S.C. § 1915A(b)(1). *Leal* v. *Ga. Dep't of Corr.*, 254 F.3d 1276, 1278 (11th Cir. 2001).[8] In reviewing the dismissal of a complaint, we

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[7] Goodman's complaint also alleges: (1) racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e17, and the Equal Protection Clause; (2) violations of the Due Process Clause; (3) retaliatory action by prison officials as a result of his filing lawsuits; (4) unsanitary/inadequate food conditions and preparation; and (5) unsafe conditions in not having fire drills. While Goodman appeals the dismissal of these claims as well, the district court did not err in dismissing these claims, and we affirm their dismissal without further discussion.

[8] In *Leal*, this Court first considered the issue of the applicable standard of review for an appeal of a dismissal pursuant to 28 U.S.C. § 1915A(b)(1). 254 F.3d at 1278. This Court concluded that *de novo* review was appropriate because § 1915A(b)(1)

accept all the alleged facts as true and view them in the light most favorable to the non-moving party. *Cottone* v. *Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). Dismissal of the complaint is not appropriate "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marsh* v. *Butler County, Ala.*, 268 F.3d 1014, 1022 (11th Cir. 2001) (*en banc*) (internal quotation marks and citations omitted); *see also GJR Investments, Inc.* v. *County of Escambia, Fla.*, 132 F.3d 1359, 1367 (11th Cir. 1998) ("[w]hile Fed. R. Civ. P. 8 allows a plaintiff considerable leeway in framing its complaint, this circuit, along with others, has tightened the application of Rule 8 with respect to § 1983 cases in an effort to weed out nonmeritorious claims, requiring that a § 1983 plaintiff allege with some specificity the facts which make out its claim.").

We review the grant of summary judgment *de novo*, viewing all evidence and factual inferences therefrom in the light most favorable to the non-moving party. *Wascura* v. *City of South Miami*, 257 F.3d 1238, 1242 (11th Cir. 2001).

III. SECTION 1983 CLAIMS

Regarding the dismissal of Goodman's § 1983 claims for monetary damages, we affirm the district court's dismissal as to: (1) the GDOC; (2) Garner and Thomas,

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tracked the lanaguage of 28 U.S.C. § 1915(e)(2)(B)(ii). *Leal*, 254 F.3d at 1279. This Court previously had determined that because § 1915(e)(2)(B)(ii) tracks the language of Federal Rule of Civil Procedure 12(b)(6), it should be subject to the same, well-settled *de novo* review standard for Rule 12(b)(6) dismissals. *Id.* at 1278.

in their individual and official capacities; and (3) the remaining GSP defendants in their official capacities.[9]

We affirm the dismissal as to the GDOC because the Eleventh Amendment bars a § 1983 claim against the GDOC. *Stevens* v. *Gay*, 864 F.2d 113, 115 (11th Cir. 1989) (citing *Alabama* v. *Pugh*, 438 U.S. 781, 782, 98 S. Ct. 3057, 3057 (1978) (per curiam)).

With regard to Commissioner Garner and Director Thomas, Goodman has alleged no factual basis or theory that states a claim for any form of relief against these two men who work at the state level and not directly at GSP. Therefore, we affirm the district court's dismissal of Goodman's § 1983 claims against Garner and Thomas, in their individual and official capacities.

As to the remaining defendants, who are all GSP prison officials, suits for monetary damages under § 1983 are valid only against prison officials in their individual, not official, capacities. *See Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989) (stating "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"); *D'Aguanno* v. *Gallagher*, 50 F.3d 877, 879 (11th Cir. 1995) (permitting suits under § 1983 for monetary damages against state officials in their individual capacities).

However, we conclude that the district court erred in dismissing some of Goodman's § 1983 claims for monetary damages against the remaining individual defen-

[9] As stated earlier, the State of Georgia is a defendant in this case for the purposes of Goodman's ADA claims only. While Goodman clearly focuses on both monetary damages and injunctive relief under the ADA, his Eighth-Amendment claims under § 1983 appear to be focused on obtaining monetary damages.

dant prison officials at GSP, in their individual capacities. We do so for the following reasons.

A. Eighth Amendment Principles

"Whether one characterizes the treatment received by [a partially paraplegic inmate] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard . . . ." *Evans* v. *Dugger*, 908 F.2d 801, 804-06 (11th Cir. 1990) (citations omitted). In defining the deliberate indifference standard, the Supreme Court stated:

> [A] prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.

Farmer v. *Brennan*, 511 U.S. 825, 837, 114 S. Ct. 1970, 1979 (1994).

Courts use a two-part analysis in Eighth-Amendment challenges to conditions-of-confinement and failure-to-attend-to-medical-needs cases. Under the objective component, a prisoner must prove the condition he complains of is sufficiently serious to violate the Eighth Amendment. *Hudson* v. *McMillian*, 503 U.S. 1, 8, 112 S. Ct. 995, 999 (1992). Specifically, a prisoner must prove "a serious medical need" or the denial of "the minimal civilized measure of life's necessities." *Chandler* v. *Crosby*, No. 03-12017, Slip Op. at 3369 (11th Cir. August 6, 2004); *Farrow* v. *West*, 320 F.3d 1235, 1243 (11th Cir. 2003); *see Rhodes* v. *Chapman*, 452 U.S.

337, 347, 101 S. Ct. 2392, 1000 [*sic*] (1981). "The challenged prison condition must be 'extreme'" and must "pose an unreasonable risk of serious damage to his future health." *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 9, 112 S. Ct. at 1000).

Under the subjective component, the prisoner must prove that the prison official acted with "deliberate indifference." *Farmer*, 511 U.S. at 836, 837, 114 S. Ct. at 1978, 1979; *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999; *Wilson* v. *Seiter*, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327 (1991). To show deliberate indifference, the prisoner must show that the defendant prison official "'acted with a sufficiently culpable state of mind'" with regard to the serious prison condition or serious medical need in issue. *Chandler*, Slip Op. at 3369 (quoting *Hudson*, 503 U.S. at 8, 112 S. Ct. at 999). Negligence does not satisfy this standard. *Id.* A prisoner need not prove the prison official acted with "'the very purpose of causing harm or with knowledge that harm [would] result.'" *Id.* (quoting *Farmer*, 511 U.S. at 835, 114 S. Ct. at 1970). However, a prison official may escape liability for known risks "if [he] responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844, 114 S. Ct. at 1982-83 (quotation marks and citations omitted).

B. Goodman's Allegations Under Section 1983

The magistrate judge and district court correctly noted that Goodman's complaint was less than a model of clarity. However, this is not a "pure" case of failure to state a claim. Rather, we conclude that the allegations contained in Goodman's complaint, TRO motions, and other court filings evidence sufficient allegations to proceed with a limited number of Eighth-Amendment claims under § 1983.

Although Goodman never formally requested leave to amend his complaint, Goodman's filings, taken as a whole, evidence a desire to add facts and substance to his allegations. For example, on May 24, 1999, Goodman filed a "Motion to Amend his Emergency Motion for T.R.O. and/or P.I." Under these circumstances, the act of dismissal, without leave to amend, was too severe a sanction. Rather, Goodman should have been given an opportunity to amend and streamline his complaint. *See generally Troville* v. *Venz*, 303 F.3d 1256, 1260 (11th Cir. 2002); *Magluta* v. *Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001).

Therefore, we remand this case to the district court so that Goodman may be permitted to amend his § 1983 claims for Eighth-Amendment violations. However, we caution Goodman that this is not an invitation to assert all of his purported Eighth-Amendment claims, some of which are obviously frivolous. Rather, three of his claims regarding his conditions of confinement and need for medical care, if true, should be the focus of his amended complaint.

First, Goodman alleges that he is not able to move his wheelchair in his cell. If Goodman is to be believed, this effectively amounts to some form of total restraint twenty-three to twenty-four hours-a-day without penal justification. *See Hope* v. *Pelzer*, 536 U.S. 730, 738, 122 S. Ct. 2508, 2514-15 (2002). Second, Goodman has alleged several instances in which he was forced to sit in his own bodily waste because prison officials refused to provide assistance.[10] Third, Goodman has alleged

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[10] Courts typically accord particular weight to exposure to human waste in condition-of-confinement cases. *See McBride* v. *Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) (finding "sufficiently serious conditions of confinement" where inmate in feces-covered

sufficient conduct to proceed with a § 1983 claim based on the prison staff's supposed "deliberate indifference" to his serious medical condition of being partially paraplegic; that is, knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison facilities for the disabled, such as toilets without the necessary support or handrails. *See Miller* v. *King*, No. 02-13348, slip op. at _____ (Sept. _____, 2004); *Evans* v. *Dugger*, 908 F.2d 801, 804-06 (11th Cir. 1990).

As we did in *Magluta* v. *Samples*, 375 F.3d 1269 (11th Cir. 2004),

> [w]e emphasize the hypothetical nature of our holding in this case. If the defendants at later stages of this litigation, *e.g.*, at summary judgment, can establish that legitimate reasons do in fact exist and/or the conditions of the confinement are not as harsh or prolonged as alleged, then a different case will be presented. Additionally, although [Goodman] has specifically alleged that he advised each defendant personally of the violations of his

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cell for three days); *McCord* v. *Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) ("unquestionably a health hazard" to live in "filthy water contaminated with human waste"); *Fruit* v. *Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990) ("courts have been especially cautious about condoning conditions that include an inmate's proximity to human waste"); *Johnson* v. *Pelker*, 891 F.2d 136, 139 (7th Cir. 1989) (three days in cell with feces smeared on walls not within "civilized standards, humanity, and decency"); *LaReau* v. *MacDougall*, 473 F.2d 974, 978 (2nd Cir. 1972) ("Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted.")

> constitutional rights only to be rebuffed, and that each had personal involvement in relevant decisions, development of the record at summary judgment may reveal that one or more of the defendants in fact had no personal involvement or liability.

Id. at 1276 n.5.

IV. ADA CLAIM FOR INJUNCTIVE RELIEF

We first affirm the magistrate judge's grant of summary judgment to all the defendants on Goodman's ADA claims for monetary damages as barred by the Eleventh Amendment. *Miller* v. *King*, No. 02-13348, slip. op. at __. The magistrate judge, however, erred in determining that Goodman's ADA claims for injunctive relief under Title II were moot for the following reasons.

It is true that "[t]he general rule is that a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief." *McKinnon* v. *Talladega Co.*, 745 F.2d 1360, 1363 (11th Cir. 1984) (citation omitted). The "capable of repetition, yet evading review" doctrine provides an exception to the general rule of mootness. That doctrine requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149, 96 S. Ct. 347, 349 (1975). In *Preiser* v. *Newkirk*, 422 U.S. 395, 402-03, 95 S. Ct. 2330, 2334-35 (1975), the Supreme Court concluded that the "capable of repetition, yet evading review" doctrine would not apply in prison transfer cases if the likelihood of re-transfer was remote and speculative.

Since the filing of his lawsuit in 1999, Goodman has been transferred nine times: (1) July 1999, to Lee

Arrendale State Prison; (2) November 1999, to Macon State Prison; (3) January 2000, to Baldwin State Prison; (4) February 2000, back to GSP; (5) March 2000, to Augusta State Medical Prison; (6) August 2000, to Hays State Prison; (7) March 2001, to Valdosta State Prison; (8) November 2003, to Ware State Prison; and (9) January 2004, back to GSP.[11] At oral argument, the government indicated that Goodman had been transferred again to Valdosta State Prison. However, this Court continues to list Goodman's address as GSP, given that we have received status-report requests from Goodman at GSP as recently as April 21, 2004.

What is certain is that Goodman is either at GSP or the likelihood of his eventual transfer back to GSP is far from remote or speculative. Consequently, we conclude that the "capable of repetition, yet evading review" doctrine applies in this case and that Goodman's claims for injunctive relief under Title II of the ADA are not moot.

Therefore, this case is remanded to the district court to consider Goodman's claims for injunctive relief under Title II of the ADA. Because Goodman is already amending his complaint for the purposes of his § 1983 action, Goodman may also take this opportunity to present a clearer picture of his allegations for injunctive relief under Title II of the ADA. *See Miller*, No. 02-13348, slip op. at—(outlining the requirements for stating a claim under Title II of the ADA). Furthermore, the proper defendants on Goodman's ADA claims for injunctive relief should be Warden Sikes and Commissioner Garner, in their official capacities, not

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[11] The district court's docket sheet indicated a January 5, 2004, change of address for Goodman to GSP.

the State of Georgia or the GDOC.[12] *See Miller*, No. 02-13348, slip op. at ___.

V. CONCLUSION

For all the above reasons, we vacate the dismissal of Goodman's § 1983 claims for Eighth-Amendment violations against the remaining six GSP officials, in their individual capacities, with regard to his assertions that: (1) he is left immobile in his cell for prolonged periods of time; (2) he is forced to spend significant time in his own waste because prison officials refuse to provide assistance; and (3) prison officials are deliberately indiffer-

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[12] Because Goodman has been transferred so many times and for judicial economy, we conclude that Goodman may also pursue his ADA claims for injunctive relief against Commissioner Garner. By so concluding, any subsequent transfer away from GSP would not render Goodman's ADA claims under Title II moot. *See Randolph* v. *Rodgers*, 253 F.3d 342, 345-46 (8th Cir. 2001) (prisoner claims against the director of the state prison system were not moot upon transfer to another prison because the director had authority over the entire prison system). Further, the Commissioner has the power to provide funds in order to bring a particular prison, if ordered by a court, into ADA compliance or to transfer a prisoner to a prison that is ADA-compliant. *See* Ga. Code § 42-2-8 ("Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities . . . ."); Ga. Comp. R. & Reg. § 125-2-4.18(1) ("The Commissioner shall . . . have sole authority to transfer inmates from one correctional institution to any other institution."). Should Garner no longer be the Commissioner, the district court shall identify the current Commissioner and allow Goodman to substitute that state official as a defendant, in his official capacity, as to his ADA claims for injunctive relief.

ent to his needs as a partially paraplegic prisoner; that is, knowingly providing no physical therapy and inadequate medical treatment, systematic denial of access to virtually all prison programs and activities because of his disability, and woefully inadequate and inhumane prison conditions for the disabled, such as toilets with the necessary support or handrails. In all other respects, we affirm the district court's dismissal of Goodman's § 1983 claims for Eighth-Amendment violations.

With respect to Goodman's ADA claims, we affirm the magistrate judge's grant of summary judgment as to Goodman's claims for monetary relief under Title II of the ADA against all defendants, but vacate the grant of summary judgment on Goodman's claims for injunctive relief under Title II of the ADA. The proper defendants on Goodman's ADA claims for injunctive relief are Warden Sikes and Commissioner Garner (or the current Commissioner), in their official capacities.

VACATED, REVERSED, and REMANDED, in part; AFFIRMED, in part.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
STATESBORO DIVISION

CIVIL ACTION NO.: CV699-012

TONY GOODMAN, PLAINTIFF

v.

THE STATE OF GEORGIA, DEFENDANT

[Filed: Dec. 20, 2001]

ORDER

Plaintiff, an inmate currently confined at Valdosta State Prison in Valdosta, Georgia, filed this civil rights action pursuant to 42 U.S.C. § 1983 challenging the conditions of his confinement. Plaintiff alleges, *inter alia*, that the State of Georgia did not provide him with reasonable accommodations in violation of the Americans With Disabilities Act. Defendant has filed a Motion for Summary Judgment (Dkt. Nos. 88, 89, and 90). Plaintiff has filed a Response and an Amended Response. (Dkt. Nos. 91, 92, and 93.)

STATEMENT OF FACTS

Plaintiff, a wheelchair-bound inmate, filed suit against the State of Georgia, among others, contending that the State violated Title II of the Americans With Disabilities Act. Specifically, Plaintiff contends that he was transferred from a medical prison to Georgia State

Prison which was not equipped to deal with his needs. He contends that he was placed in administrative segregation and was denied access to the law library, church, and gymnasium. He also contends that GSP did not have wheelchair accessible bathrooms, shower stalls, sinks, and entrances to buildings. Plaintiff alleges that he was deprived of counseling, education, vocational training, and recreation activities. Plaintiff has requested monetary and injunctive relief.

Defendant asserts that Plaintiff is prevented, by the Eleventh Amendment, from pursuing his ADA claim for money damages. Defendant also asserts that Plaintiff's request for injunctive relief does not state a claim upon which relief can be granted.

STANDARD OF DETERMINATION

Summary judgment should be granted only if "there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The procedure for disposing of a summary judgment motion is well established. The Court may grant summary judgment to a party when, after a reasonable time for discovery, the evidence demonstrates that the nonmovant has failed to establish an essential element of his case. The party moving for summary judgment bears the initial burden of meeting this exacting standard. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L Ed. 2d 142 (1970). In applying this standard, the *Adickes* Court explained that a court should view the evidence and all factual inferences in the light most favorable to the party opposing the motion. All reasonable doubts regarding the facts should be resolved in favor of the nonmovant. *Adickes*, 398 U.S. at 157, 90 S. Ct. at 1608.

Once the moving party has met this initial burden, the burden shifts to the opposing party to show that a genuine issue of material fact exists. *Celotex Corp.* v. *Catrell*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986). The opposing party may not simply rest upon mere allegations or denials of the pleadings. Rather, the nonmoving party must make a sufficient showing of facts to establish the existence of an essential element to his case on which he will bear the burden of proof at trial. *Id.*; *Barfield* v. *Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). To oppose the motion sufficiently after the movant has met his initial burden, the nonmoving party must point to evidence in the record or present additional evidence in the form of affidavits or as otherwise provided in Rule 56 of the Federal Rules of Civil Procedure. *Riley* v. *Newton*, 94 F.3d 632, 639 (11th Cir. 1996). If the record presents factual issues, the Court must deny the motion and proceed to trial. *Environmental Defense Fund* v. *Marsh*, 651 F.2d 983, 991 (5th Cir. 1981).[1] Summary judgment is also inappropriate where the parties agree on the basic facts, but disagree about the inferences that should be drawn from these facts. *Lighting Fixture & Elec. Supply Co.* v. *Continental Ins. Co.*, 420 F.2d 1211, 1213 (5th Cir. 1969).

DISCUSSION AND CITATION OF AUTHORITY

I. Plaintiff's Claim for Monetary Damages.

The State of Georgia asserts that it is entitled to Eleventh Amendment immunity from money damages.

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[1] In *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

The Supreme Court recently determined that the Eleventh Amendment prevents states and state entities from being sued for money damages under Title I of the Americans with Disabilities Act. *Board of Trustees of the Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 121 S. Ct. 955, 960, 148 L. Ed. 2d 866 (2001). The *Garrett* decision addresses whether states are immune from Title I of the ADA, but does not mention state immunity from Title II suits, such as Plaintiff is pursuing here. *Garrett*, 121 S. Ct. at 960 n.1. In *Williamson v. Georgia Department of Human Resources, et al.*, this Court concluded that states are also immune from suits under Title II. 150 F. Supp. 2d 1375 (S.D. Ga. 2001). Following the rubric established by the Supreme Court in *Garrett*, *Williamson* concludes that Congress did not identify a pattern of unconstitutional behavior by the States, and therefore did not abrogate traditional Eleventh Amendment immunity. *Williamson*, 150 F. Supp. 2d 1375, 1381. Plaintiff's claims for money damages against the State of Georgia are precluded by the Eleventh Amendment.

II. Plaintiff's Claim For Injunctive Relief.

Plaintiff has also, on numerous occasions, requested a preliminary injunction. Plaintiff has requested, as addressed by Defendant's first Motion for Summary Judgement, that he be transferred out of Georgia State Prison because it did not accommodate his needs as provided by the Americans with Disabilities Act. The record reflects that Plaintiff was transferred from Georgia State Prison to Lee Arrendale State Prison prior to July 1999. (Dkt. No. 17.) Plaintiff was transferred to Macon State Prison prior to November 1999. (Dkt. No. 27.) Plaintiff was transferred to Baldwin State Prison in January 2000. (Dkt. No. 35.) He was

transferred back to Georgia State Prison in February 2000. (Dkt. N. 39.) Plaintiff was moved to Augusta State Medical Prison in March 2000. (Dkt. No. 45.) Plaintiff notified the court of his transfer to Hays State Prison at the end of August 2000. (Dkt. No. 49.) Plaintiff was transferred to Valdosta State Prison in March 20001. (Dkt. No. 56.)

Plaintiff brought this claim in January 1999, claiming that Georgia State Prison did not comply with the Americans with Disabilities Act. Plaintiff was transferred out of GSP in July 1999, and has spent time in numerous institutions, including medical prisons since the time he filed his complaint. Currently, Plaintiff is incarcerated in Valdosta State Prison. Plaintiff's claim for injunctive relief has been rendered moot by his transfer from Georgia State Prison. *Minnesota Humane Society* v. *Clark*, 184 F.3d 795 (8th Cir. 1995); *McAlpine* v. *Thompson*, 187 F.3d 1213 (10th Cir. 1999).

CONCLUSION

For the above and foregoing reasons, summary judgment is **GRANTED** to Defendant.

SO ORDERED, this 20th day of December, 2001.

/s/ JAMES E. GRAHAM
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA

Case Number: CV699-012

TONY GOODMAN

v.

THE STATE OF GEORGIA

JUDGMENT IN A CIVIL CASE

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came before the Court The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That in accordance with the Order of this Court of December 20, 2001, Defendant's motion for summary judgment is GRANTED and JUDGMENT is hereby entered DISMISSING this action.

E.O.D.

[12/20/01]
DATE

Illegible signature
INITIALS

December 20, 2001
Date

Henry R. Crumley, Jr.
Clerk

/s/ NANCY Z. SUTTURE
NANCY Z. SUTTURE
(By) Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-10168-GG

TONY GOODMAN, PLAINTIFF-APPELLANT

v.

O.T. RAY, ET AL., DEFENDANTS
THE STATE OF GEORGIA, DEFENDANT-APPELLEE
UNITED STATES OF AMERICA, INTERVENOR

On Appeal from the United States District Court
for the Southern District of Georgia

[Filed: Dec. 9, 2004]

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19 _____,
_____ F.2d. _____).

Before: CARNES, HULL and HILL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. HALL
FRANK M. HALL
UNITED STATES CIRCUIT JUDGE

APPENDIX D

CONSTITUTION OF THE UNITED STATES

AMENDMENT XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

SELECTED PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT OF 1990, 42 U.S.C. 12101 *et seq.*

§ 12101. Findings and purpose

(a) Findings

The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices,

exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose

It is the purpose of this chapter—

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

Title II, Part A, of The Americans With Disabilities Act

§ 12131. Definitions

As used in this subchapter:

(1) Public entity

The term "public entity" means—

(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government; and

(C) the National Railroad Passenger Corporation, and any commuter authority (as defined in section 2410(4) of title 49).

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

§ 12132. Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 794a of title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

§ 12134. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part. Such regulations shall not include any matter within the scope of the authority of the Secretary of Transportation under section 12143, 12149, or 12164 of this title.

(b) Relationship to other regulations

Except for "program accessibility, existing facilities," and "communications," regulations under subsection (a) of this section shall be consistent with this chapter and with the coordination regulations under part 41 of title 28, Code of Federal Regulations (as promulgated by the Department of Health, Education, and Welfare on January 13, 1978), applicable to recipients of Federal financial assistance under section 794 of title 29. With respect to "program accessibility, existing facilities", and "communications", such regulations shall be consistent with regulations and analysis as in part 39 of title 28 of the Code of Federal Regulations, applicable to federally conducted activities under such section 794 of title 29.

(c) Standards

Regulations under subsection (a) of this section shall include standards applicable to facilities and vehicles covered by this part, other than facilities, stations, rail passenger cars, and vehicles covered by part B of this subchapter. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204(a) of this title.

* * * * *

Title II, Part B, of The Americans With Disabilities Act

§ 12141. Definitions

As used in this subpart:

(1) Demand responsive system

The term "demand responsive system" means any system of providing designated public transportation which is not a fixed route system.

(2) Designated public transportation

The term "designated public transportation" means transportation (other than public school transportation) by bus, rail, or any other conveyance (other than transportation by aircraft or intercity or commuter rail transportation (as defined in section 12161 of this title)) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(3) Fixed route system

The term "fixed route system" means a system of providing designated public transportation on which a vehicle is operated along a prescribed route according to a fixed schedule.

(4) Operates

The term "operates", as used with respect to a fixed route system or demand responsive system, includes operation of such system by a person under a contractual or other arrangement or relationship with a public entity.

(5) Public school transportation

The term "public school transportation" means transportation by schoolbus vehicles of schoolchil-

dren, personnel, and equipment to and from a public elementary or secondary school and school-related activities.

(6) Secretary

The term "Secretary" means the Secretary of Transportation.

§ 12142. Public entities operating fixed route systems

(a) Purchase and lease of new vehicles

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease a new bus, a new rapid rail vehicle, a new light rail vehicle, or any other new vehicle to be used on such system, if the solicitation for such purchase or lease is made after the 30th day following July 26, 1990, and if such bus, rail vehicle, or other vehicle is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(b) Purchase and lease of used vehicles

Subject to subsection (c)(1) of this section, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system to purchase or lease, after the 30th day following July 26, 1990, a used vehicle for use on such system unless such entity makes demonstrated good faith efforts to purchase or lease a used vehicle for use on such system that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(c) Remanufactured vehicles

(1) General rule

Except as provided in paragraph (2), it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system—

(A) to remanufacture a vehicle for use on such system so as to extend its usable life for 5 years or more, which remanufacture begins (or for which the solicitation is made) after the 30th day following July 26, 1990; or

(B) to purchase or lease for use on such system a remanufactured vehicle which has been remanufactured so as to extend its usable life for 5 years or more, which purchase or lease occurs after such 30th day and during the period in which the usable life is extended;

unless, after remanufacture, the vehicle is, to the maximum extent feasible, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Exception for historic vehicles

(A) General rule

If a public entity operates a fixed route system any segment of which is included on the National Register of Historic Places and if making a vehicle of historic character to be used solely on such segment readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity only has to make (or to purchase or lease a remanufactured vehicle with) those modi-

fications which are necessary to meet the requirements of paragraph (1) and which do not significantly alter the historic character of such vehicle.

(B) Vehicles of historic character defined by regulations

For purposes of this paragraph and section 12148(b) of this title, a vehicle of historic character shall be defined by the regulations issued by the Secretary to carry out this subsection.

§ 12143. Paratransit as a complement to fixed route service

(a) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a public entity which operates a fixed route system (other than a system which provides solely commuter bus service) to fail to provide with respect to the operations of its fixed route system, in accordance with this section, paratransit and other special transportation services to individuals with disabilities, including individuals who use wheelchairs, that are sufficient to provide to such individuals a level of service (1) which is comparable to the level of designated public transportation services provided to individuals without disabilities using such system; or (2) in the case of response time, which is comparable, to the extent practicable, to the level of designated public transportation services provided to individuals without disabilities using such system.

(b) Issuance of regulations

Not later than 1 year after July 26, 1990, the Secretary shall issue final regulations to carry out this section.

(c) Required contents of regulations

(1) Eligible recipients of service

The regulations issued under this section shall require each public entity which operates a fixed route system to provide the paratransit and other special transportation services required under this section—

(A)(i) to any individual with a disability who is unable, as a result of a physical or mental impairment (including a vision impairment) and without the assistance of another individual (except an operator of a wheelchair lift or other boarding assistance device), to board, ride, or disembark from any vehicle on the system which is readily accessible to and usable by individuals with disabilities;

(ii) to any individual with a disability who needs the assistance of a wheelchair lift or other boarding assistance device (and is able with such assistance) to board, ride, and disembark from any vehicle which is readily accessible to and usable by individuals with disabilities if the individual wants to travel on a route on the system during the hours of operation of the system at a time (or within a reasonable period of such time) when such a vehicle is not being used to provide designated public transportation on the route; and

(iii) to any individual with a disability who has a specific impairment-related condition which prevents such individual from traveling to a

boarding location or from a disembarking location on such system;

(B) to one other individual accompanying the individual with the disability; and

(C) to other individuals, in addition to the one individual described in subparagraph (B), accompanying the individual with a disability provided that space for these additional individuals is available on the paratransit vehicle carrying the individual with a disability and that the transportation of such additional individuals will not result in a denial of service to individuals with disabilities.

For purposes of clauses (i) and (ii) of subparagraph (A), boarding or disembarking from a vehicle does not include travel to the boarding location or from the disembarking location.

(2) Service area

The regulations issued under this section shall require the provision of paratransit and special transportation services required under this section in the service area of each public entity which operates a fixed route system, other than any portion of the service area in which the public entity solely provides commuter bus service.

(3) Service criteria

Subject to paragraphs (1) and (2), the regulations issued under this section shall establish minimum service criteria for determining the level of services to be required under this section.

(4) Undue financial burden limitation

The regulations issued under this section shall provide that, if the public entity is able to demonstrate to the satisfaction of the Secretary that the provision of paratransit and other special transportation services otherwise required under this section would impose an undue financial burden on the public entity, the public entity, notwithstanding any other provision of this section (other than paragraph (5)), shall only be required to provide such services to the extent that providing such services would not impose such a burden.

(5) Additional services

The regulations issued under this section shall establish circumstances under which the Secretary may require a public entity to provide, notwithstanding paragraph (4), paratransit and other special transportation services under this section beyond the level of paratransit and other special transportation services which would otherwise be required under paragraph (4).

(6) Public participation

The regulations issued under this section shall require that each public entity which operates a fixed route system hold a public hearing, provide an opportunity for public comment, and consult with individuals with disabilities in preparing its plan under paragraph (7).

(7) Plans

The regulations issued under this section shall require that each public entity which operates a fixed route system—

(A) within 18 months after July 26, 1990, submit to the Secretary, and commence implementation of, a plan for providing paratransit and other special transportation services which meets the requirements of this section; and

(B) on an annual basis thereafter, submit to the Secretary, and commence implementation of, a plan for providing such services.

(8) Provision of services by others

The regulations issued under this section shall—

(A) require that a public entity submitting a plan to the Secretary under this section identify in the plan any person or other public entity which is providing a paratransit or other special transportation service for individuals with disabilities in the service area to which the plan applies; and

(B) provide that the public entity submitting the plan does not have to provide under the plan such service for individuals with disabilities.

(9) Other provisions

The regulations issued under this section shall include such other provisions and requirements as the Secretary determines are necessary to carry out the objectives of this section.

(d) Review of plan

(1) General rule

The Secretary shall review a plan submitted under this section for the purpose of determining whether or not such plan meets the requirements of this section, including the regulations issued under this section.

(2) Disapproval

If the Secretary determines that a plan reviewed under this subsection fails to meet the requirements of this section, the Secretary shall disapprove the plan and notify the public entity which submitted the plan of such disapproval and the reasons therefor.

(3) Modification of disapproved plan

Not later than 90 days after the date of disapproval of a plan under this subsection, the public entity which submitted the plan shall modify the plan to meet the requirements of this section and shall submit to the Secretary, and commence implementation of, such modified plan.

(e) "Discrimination" defined

As used in subsection (a) of this section, the term "discrimination" includes—

(1) a failure of a public entity to which the regulations issued under this section apply to submit, or commence implementation of, a plan in accordance with subsections (c)(6) and (c)(7) of this section;

(2) a failure of such entity to submit, or commence implementation of, a modified plan in accordance with subsection (d)(3) of this section;

(3) submission to the Secretary of a modified plan under subsection (d)(3) of this section which does not meet the requirements of this section; or

(4) a failure of such entity to provide paratransit or other special transportation services in accordance with the plan or modified plan the public entity submitted to the Secretary under this section.

(f) Statutory construction

Nothing in this section shall be construed as preventing a public entity—

(1) from providing paratransit or other special transportation services at a level which is greater than the level of such services which are required by this section,

(2) from providing paratransit or other special transportation services in addition to those paratransit and special transportation services required by this section, or

(3) from providing such services to individuals in addition to those individuals to whom such services are required to be provided by this section.

§ 12144. Public entity operating a demand responsive system

If a public entity operates a demand responsive system, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for such entity to purchase or lease a new vehicle for use on such system, for which a solicitation is made after the 30th day following July 26, 1990, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, unless such system, when viewed in its entirety, provides a level of service to such individuals equivalent to the level of service such system provides to individuals without disabilities.

§ 12145. Temporary relief where lifts are unavailable

(a) Granting

With respect to the purchase of new buses, a public entity may apply for, and the Secretary may temporarily relieve such public entity from the obligation under section 12142(a) or 12144 of this title to purchase new buses that are readily accessible to and usable by individuals with disabilities if such public entity demonstrates to the satisfaction of the Secretary—

(1) that the initial solicitation for new buses made by the public entity specified that all new buses were to be lift-equipped and were to be otherwise accessible to and usable by individuals with disabilities;

(2) the unavailability from any qualified manufacturer of hydraulic, electromechanical, or other lifts for such new buses;

(3) that the public entity seeking temporary relief has made good faith efforts to locate a qualified manufacturer to supply the lifts to the manufacturer of such buses in sufficient time to comply with such solicitation; and

(4) that any further delay in purchasing new buses necessary to obtain such lifts would significantly impair transportation services in the community served by the public entity.

(b) Duration and notice to Congress

Any relief granted under subsection (a) of this section shall be limited in duration by a specified date, and the appropriate committees of Congress shall be notified of any such relief granted.

(c) Fraudulent application

If, at any time, the Secretary has reasonable cause to believe that any relief granted under subsection (a) of this section was fraudulently applied for, the Secretary shall—

(1) cancel such relief if such relief is still in effect; and

(2) take such other action as the Secretary considers appropriate.

§ 12146. New facilities

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

§ 12147. Alterations of existing facilities

(a) General rule

With respect to alterations of an existing facility or part thereof used in the provision of designated public transportation services that affect or could affect the usability of the facility or part thereof, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.

Where the public entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(b) Special rule for stations

(1) General rule

For purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity that provides designated public transportation to fail, in accordance with the provisions of this subsection, to make key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

(2) Rapid rail and light rail key stations

(A) Accessibility

Except as otherwise provided in this paragraph, all key stations (as determined under criteria established by the Secretary by regulation) in rapid rail and light rail systems shall be made readily

accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 3-year period beginning on July 26, 1990.

(B) Extension for extraordinarily expensive structural changes

The Secretary may extend the 3-year period under subparagraph (A) up to a 30-year period for key stations in a rapid rail or light rail system which stations need extraordinarily expensive structural changes to, or replacement of, existing facilities; except that by the last day of the 20th year following July 26, 1990, at least 2/3 of such key stations must be readily accessible to and usable by individuals with disabilities.

(3) Plans and milestones

The Secretary shall require the appropriate public entity to develop and submit to the Secretary a plan for compliance with this subsection—

(A) that reflects consultation with individuals with disabilities affected by such plan and the results of a public hearing and public comments on such plan, and

(B) that establishes milestones for achievement of the requirements of this subsection.

§ 12148. Public transportation programs and activities in existing facilities and one car per train rule

(a) Public transportation programs and activities in existing facilities

(1) In general

With respect to existing facilities used in the provision of designated public transportation services, it shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, for a public entity to fail to operate a designated public transportation program or activity conducted in such facilities so that, when viewed in the entirety, the program or activity is readily accessible to and usable by individuals with disabilities.

(2) Exception

Paragraph (1) shall not require a public entity to make structural changes to existing facilities in order to make such facilities accessible to individuals who use wheelchairs, unless and to the extent required by section 12147(a) of this title (relating to alterations) or section 12147(b) of this title (relating to key stations).

(3) Utilization

Paragraph (1) shall not require a public entity to which paragraph (2) applies, to provide to individuals who use wheelchairs services made available to the general public at such facilities when such individuals could not utilize or benefit from such services provided at such facilities.

(b) One car per train rule

(1) General rule

Subject to paragraph (2), with respect to 2 or more vehicles operated as a train by a light or rapid rail system, for purposes of section 12132 of this title and section 794 of Title 29, it shall be considered discrimination for a public entity to fail to have at least 1 vehicle per train that is accessible to individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than the last day of the 5-year period beginning on the effective date of this section.

(2) Historic trains

In order to comply with paragraph (1) with respect to the remanufacture of a vehicle of historic character which is to be used on a segment of a light or rapid rail system which is included on the National Register of Historic Places, if making such vehicle readily accessible to and usable by individuals with disabilities would significantly alter the historic character of such vehicle, the public entity which operates such system only has to make (or to purchase or lease a remanufactured vehicle with) those modifications which are necessary to meet the requirements of section 12142(c)(1) of this title and which do not significantly alter the historic character of such vehicle.

§ 12149. Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an ac-

cessible format, necessary for carrying out this subpart (other than section 12143 of this title).

(b) Standards

The regulations issued under this section and section 12143 of this title shall include standards applicable to facilities and vehicles covered by this part. The standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 12204 of this title.

§ 12150. Interim accessibility requirements

If final regulations have not been issued pursuant to section 12149 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities as required under sections 12146 and 12147 of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that facilities be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

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§ 12161. Definitions

As used in this subpart:

(1) Commuter authority

The term "commuter authority" has the meaning given such term in section 502(8) of Title 45.

(2) Commuter rail transportation

The term "commuter rail transportation" has the meaning given the term "commuter rail passenger transportation" in section 502(9) of Title 45.

(3) Intercity rail transportation

The term "intercity rail transportation" means transportation provided by the National Railroad Passenger Corporation.

(4) Rail passenger car

The term "rail passenger car" means, with respect to intercity rail transportation, single-level and bi-level coach cars, single-level and bi-level dining cars, single-level and bi-level sleeping cars, single-level and bi-level lounge cars, and food service cars.

(5) Responsible person

The term "responsible person" means—

(A) in the case of a station more than 50 percent of which is owned by a public entity, such public entity;

(B) in the case of a station more than 50 percent of which is owned by a private party, the persons providing intercity or commuter rail transportation to such station, as allocated on an equitable

basis by regulation by the Secretary of Transportation; and

(C) in a case where no party owns more than 50 percent of a station, the persons providing intercity or commuter rail transportation to such station and the owners of the station, other than private party owners, as allocated on an equitable basis by regulation by the Secretary of Transportation.

(6) Station

The term "station" means the portion of a property located appurtenant to a right-of-way on which intercity or commuter rail transportation is operated, where such portion is used by the general public and is related to the provision of such transportation, including passenger platforms, designated waiting areas, ticketing areas, restrooms, and, where a public entity providing rail transportation owns the property, concession areas, to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property, but such term does not include flag stops.

§ 12162. Intercity and commuter rail actions considered discriminatory

(a) Intercity rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations

issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New intercity cars

(A) General rule

Except as otherwise provided in this subsection with respect to individuals who use wheelchairs, it shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Special rule for single-level passenger coaches for individuals who use wheelchairs

Single-level passenger coaches shall be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, and a space to fold and store such passenger's wheelchair; and

(iv) have a restroom usable by an individual who uses a wheelchair,

only to the extent provided in paragraph (3).

(C) Special rule for single-level dining cars for individuals who use wheelchairs

Single-level dining cars shall not be required to—

(i) be able to be entered from the station platform by an individual who uses a wheelchair; or

(ii) have a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger.

(D) Special rule for bi-level dining cars for individuals who use wheelchairs

Bi-level dining cars shall not be required to—

(i) be able to be entered by an individual who uses a wheelchair;

(ii) have space to park and secure a wheelchair;

(iii) have a seat to which a passenger in a wheelchair can transfer, or a space to fold and store such passenger's wheelchair; or

(iv) have a restroom usable by an individual who uses a wheelchair.

(3) Accessibility of single-level coaches

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides intercity rail transportation to fail to have on each train which

includes one or more single-level rail passenger coaches—

(i) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than one-half of the number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than one-half of the number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 5 years after July 26, 1990; and

(ii) a number of spaces—

(I) to park and secure wheelchairs (to accommodate individuals who wish to remain in their wheelchairs) equal to not less than the total number of single-level rail passenger coaches in such train; and

(II) to fold and store wheelchairs (to accommodate individuals who wish to transfer to coach seats) equal to not less than the total number of single-level rail passenger coaches in such train,

as soon as practicable, but in no event later than 10 years after July 26, 1990.

(B) Location

Spaces required by subparagraph (A) shall be located in single-level rail passenger coaches or food service cars.

(C) Limitation

Of the number of spaces required on a train by subparagraph (A), not more than two spaces to park and secure wheelchairs nor more than two spaces to fold and store wheelchairs shall be located in any one coach or food service car.

(D) Other accessibility features

Single-level rail passenger coaches and food service cars on which the spaces required by subparagraph (A) are located shall have a restroom usable by an individual who uses a wheelchair and shall be able to be entered from the station platform by an individual who uses a wheelchair.

(4) Food service

(A) Single-level dining cars

On any train in which a single-level dining car is used to provide food service—

(i) if such single-level dining car was purchased after July 26, 1990, table service in such car shall be provided to a passenger who uses a wheelchair if—

(I) the car adjacent to the end of the dining car through which a wheelchair may enter is itself accessible to a wheelchair;

(II) such passenger can exit to the platform from the car such passenger occupies, move down the platform, and enter the adja-

cent accessible car described in subclause (I) without the necessity of the train being moved within the station; and

(III) space to park and secure a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to remain in a wheelchair), or space to store and fold a wheelchair is available in the dining car at the time such passenger wishes to eat (if such passenger wishes to transfer to a dining car seat); and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

Unless not practicable, a person providing intercity rail transportation shall place an accessible car adjacent to the end of a dining car described in clause (i) through which an individual who uses a wheelchair may enter.

(B) Bi-level dining cars

On any train in which a bi-level dining car is used to provide food service—

(i) if such train includes a bi-level lounge car purchased after July 26, 1990, table service in such lounge car shall be provided to individuals who use wheelchairs and to other passengers; and

(ii) appropriate auxiliary aids and services, including a hard surface on which to eat, shall be provided to ensure that other equivalent food service is available to individuals with disabilities, including individuals who use wheelchairs, and to passengers traveling with such individuals.

(b) Commuter rail transportation

(1) One car per train rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person who provides commuter rail transportation to fail to have at least one passenger car per train that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, in accordance with regulations issued under section 12164 of this title, as soon as practicable, but in no event later than 5 years after July 26, 1990.

(2) New commuter rail cars

(A) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease any new rail passenger cars for use in commuter rail transportation, and for which a solicitation is made later than 30 days after July 26, 1990, unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(B) Accessibility

For purposes of section 12132 of this title and section 794 of Title 29, a requirement that a rail passenger car used in commuter rail transportation be accessible to or readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, shall not be construed to require—

(i) a restroom usable by an individual who uses a wheelchair if no restroom is provided in such car for any passenger;

(ii) space to fold and store a wheelchair; or

(iii) a seat to which a passenger who uses a wheelchair can transfer.

(c) Used rail cars

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29, for a person to purchase or lease a used rail passenger car for use in intercity or commuter rail transportation, unless such person makes demonstrated good faith efforts to purchase or lease a used rail car that is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(d) Remanufactured rail cars

(1) Remanufacturing

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to remanufacture a rail passenger car for use in intercity or commuter rail transportation so as

to extend its usable life for 10 years or more, unless the rail car, to the maximum extent feasible, is made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Purchase or lease

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to purchase or lease a remanufactured rail passenger car for use in intercity or commuter rail transportation unless such car was remanufactured in accordance with paragraph (1).

(e) Stations

(1) New stations

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a person to build a new station for use in intercity or commuter rail transportation that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(2) Existing stations

(A) Failure to make readily accessible

(i) General rule

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for a responsible person to fail to make existing stations in the intercity

rail transportation system, and existing key stations in commuter rail transportation systems, readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed by the Secretary of Transportation in regulations issued under section 12164 of this title.

(ii) Period for compliance

(I) Intercity rail

All stations in the intercity rail transportation system shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable, but in no event later than 20 years after July 26, 1990.

(II) Commuter rail

Key stations in commuter rail transportation systems shall be made readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as soon as practicable but in no event later than 3 years after July 26, 1990, except that the time limit may be extended by the Secretary of Transportation up to 20 years after July 26, 1990, in a case where the raising of the entire passenger platform is the only means available of attaining accessibility or where other extraordinarily expensive structural changes are necessary to attain accessibility.

(iii) Designation of key stations

Each commuter authority shall designate the key stations in its commuter rail transportation system, in consultation with individuals with disabilities and organizations representing such individuals, taking into consideration such factors as high ridership and whether such station serves as a transfer or feeder station. Before the final designation of key stations under this clause, a commuter authority shall hold a public hearing.

(iv) Plans and milestones

The Secretary of Transportation shall require the appropriate person to develop a plan for carrying out this subparagraph that reflects consultation with individuals with disabilities affected by such plan and that establishes milestones for achievement of the requirements of this subparagraph.

(B) Requirement when making alterations

(i) General rule

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations of an existing station or part thereof in the intercity or commuter rail transportation systems that affect or could affect the usability of the station or part thereof, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the altered portions of the station are readily accessible to and usable by individuals with

disabilities, including individuals who use wheelchairs, upon completion of such alterations.

(ii) Alterations to a primary function area

It shall be considered discrimination, for purposes of section 12132 of this title and section 794 of Title 29, with respect to alterations that affect or could affect the usability of or access to an area of the station containing a primary function, for the responsible person, owner, or person in control of the station to fail to make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon completion of such alterations, where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

(C) Required cooperation

It shall be considered discrimination for purposes of section 12132 of this title and section 794 of Title 29 for an owner, or person in control, of a station governed by subparagraph (A) or (B) to fail to provide reasonable cooperation to a responsible person with respect to such station in that responsible person's efforts to comply with such

subparagraph. An owner, or person in control, of a station shall be liable to a responsible person for any failure to provide reasonable cooperation as required by this subparagraph. Failure to receive reasonable cooperation required by this subparagraph shall not be a defense to a claim of discrimination under this chapter.

§ 12163. Conformance of accessibility standards

Accessibility standards included in regulations issued under this subpart shall be consistent with the minimum guidelines issued by the Architectural and Transportation Barriers Compliance Board under section 12204(a) of this title.

§ 12164. Regulations

Not later than 1 year after July 26, 1990, the Secretary of Transportation shall issue regulations, in an accessible format, necessary for carrying out this subpart.

§ 12165. Interim accessibility requirements

(a) Stations

If final regulations have not been issued pursuant to section 12164 of this title, for new construction or alterations for which a valid and appropriate State or local building permit is obtained prior to the issuance of final regulations under such section, and for which the construction or alteration authorized by such permit begins within one year of the receipt of such permit and is completed under the terms of such permit, compliance with the Uniform Federal Accessibility Standards in effect at the time the building permit is issued shall suffice to satisfy the requirement that stations be read-

ily accessible to and usable by persons with disabilities as required under section 12162(e) of this title, except that, if such final regulations have not been issued one year after the Architectural and Transportation Barriers Compliance Board has issued the supplemental minimum guidelines required under section 12204(a) of this title, compliance with such supplemental minimum guidelines shall be necessary to satisfy the requirement that stations be readily accessible to and usable by persons with disabilities prior to issuance of the final regulations.

(b) Rail passenger cars

If final regulations have not been issued pursuant to section 12164 of this title, a person shall be considered to have complied with the requirements of section 12162(a) through (d) of this title that a rail passenger car be readily accessible to and usable by individuals with disabilities, if the design for such car complies with the laws and regulations (including the Minimum Guidelines and Requirements for Accessible Design and such supplemental minimum guidelines as are issued under section 12204(a) of this title) governing accessibility of such cars, to the extent that such laws and regulations are not inconsistent with this subpart and are in effect at the time such design is substantially completed.

Title IV of The Americans With Disabilities Act

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

(b) Relationship to other laws

Nothing in this chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter. Nothing in this chapter shall be construed to preclude the prohibition of, or the imposition of restrictions on, smoking in places of employment covered by subchapter I of this chapter, in transportation covered by subchapter II or III of this chapter, or in places of public accommodation covered by subchapter III of this chapter.

(c) Insurance

Subchapters I through III of this chapter and title IV of this Act shall not be construed to prohibit or restrict—

(1) an insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organi-

zations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) a person or organization covered by this chapter from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of subchapter[2] I and III of this chapter.

(d) Accommodations and services

Nothing in this chapter shall be construed to require an individual with a disability to accept an accommodation, aid, service, opportunity, or benefit which such individual chooses not to accept.

§ 12202. State immunity

A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in[3] Federal or State court of competent jurisdiction for a violation of this chapter. In any action against a State for a violation of the requirements of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the

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[2] So in original. Probably should be "subchapters".

[3] So in original. Probably should be "in a".

same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

§ 12203. Prohibition against retaliation and coercion

(a) Retaliation

No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

(b) Interference, coercion, or intimidation

It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.

(c) Remedies and procedures

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

§ 12204. Regulations by Architectural and Transportation Barriers Compliance Board

(a) Issuance of guidelines

Not later than 9 months after July 26, 1990, the Architectural and Transportation Barriers Compliance Board shall issue minimum guidelines that shall supplement the existing Minimum Guidelines and Requirements for Accessible Design for purposes of subchapters II and III of this chapter.

(b) Contents of guidelines

The supplemental guidelines issued under subsection (a) of this section shall establish additional requirements, consistent with this chapter, to ensure that buildings, facilities, rail passenger cars, and vehicles are accessible, in terms of architecture and design, transportation, and communication, to individuals with disabilities.

(c) Qualified historic properties

(1) In general

The supplemental guidelines issued under subsection (a) of this section shall include procedures and requirements for alterations that will threaten or destroy the historic significance of qualified historic buildings and facilities as defined in 4.1.7(1)(a) of the Uniform Federal Accessibility Standards.

(2) Sites eligible for listing in National Register

With respect to alterations of buildings or facilities that are eligible for listing in the National Register of Historic Places under the National Historic Preserva-

tion Act (16 U.S.C. 470 et seq.), the guidelines described in paragraph (1) shall, at a minimum, maintain the procedures and requirements established in 4.1.7(1) and (2) of the Uniform Federal Accessibility Standards.

(3) Other sites

With respect to alterations of buildings or facilities designated as historic under State or local law, the guidelines described in paragraph (1) shall establish procedures equivalent to those established by 4.1.7(1)(b) and (c) of the Uniform Federal Accessibility Standards, and shall require, at a minimum, compliance with the requirements established in 4.1.7(2) of such standards.

§ 12205. Attorney's fees

In any action or administrative proceeding commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.

§ 12206. Technical assistance

(c) Plan for assistance

(1) In general

Not later than 180 days after July 26, 1990, the Attorney General, in consultation with the Chair of the Equal Employment Opportunity Commission, the Secretary of Transportation, the Chair of the Architectural and Transportation Barriers Compliance Board, and the Chairman of the Federal Com-

munications Commission, shall develop a plan to assist entities covered under this chapter, and other Federal agencies, in understanding the responsibility of such entities and agencies under this chapter.

(2) Publication of plan

The Attorney General shall publish the plan referred to in paragraph (1) for public comment in accordance with subchapter II of chapter 5 of title 5 (commonly known as the Administrative Procedure Act).

(b) Agency and public assistance

The Attorney General may obtain the assistance of other Federal agencies in carrying out subsection (a) of this section, including the National Council on Disability, the President's Committee on Employment of People with Disabilities, the Small Business Administration, and the Department of Commerce.

(c) Implementation

(1) Rendering assistance

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter may render technical assistance to individuals and institutions that have rights or duties under the respective subchapter or subchapters of this chapter for which such agency has responsibility.

(2) Implementation of subchapters

(A) Subchapter I

The Equal Employment Opportunity Commission and the Attorney General shall implement the plan for assistance developed under subsection (a) of this section, for subchapter I of this chapter.

(B) Subchapter II

(i) Part A

The Attorney General shall implement such plan for assistance for part A of subchapter II of this chapter.

(ii) Part B

The Secretary of Transportation shall implement such plan for assistance for part B subchapter II of this chapter.

(C) Subchapter III

The Attorney General, in coordination with Secretary of Transportation and the Chair of the Architectural Transportation Barriers Compliance Board, shall implement such plan for assistance for subchapter III of this chapter, except for section 12184 of this title, the plan for assistance for which shall be implemented by the Secretary of Transportation.

(D) Title IV

The Chairman of the Federal Communications Commission, in coordination with the Attorney General, shall implement such plan for assistance for title IV.

(3) Technical assistance manuals

Each Federal agency that has responsibility under paragraph (2) for implementing this chapter shall, as part of its implementation responsibilities, ensure the availability and provision of appropriate technical assistance manuals to individuals or entities with rights or duties under this chapter no later than six months after applicable final regulations are published under subchapters I, II, and III of this chapter and title IV.

(d) Grants and contracts

(1) In general

Each Federal agency that has responsibility under subsection (c)(2) of this section for implementing this chapter may make grants or award contracts to effectuate the purposes of this section, subject to the availability of appropriations. Such grants and contracts may be awarded to individuals, institutions not organized for profit and no part of the net earnings of which inures to the benefit or any private shareholder or individual (including educational institutions), and associations representing individuals who have rights or duties under this chapter. Contracts may be awarded to entities

organized for profit, but such entities may not be the recipients or[1] grants described in this paragraph.

(2) Dissemination of information

Such grants and contracts, among other uses, may be designed to ensure wide dissemination of information about the rights and duties established by this chapter and to provide information and technical assistance about techniques for effective compliance with this chapter.

(e) Failure to receive assistance

An employer, public accommodation, or other entity covered under this chapter shall not be excused from compliance with the requirements of this chapter because of any failure to receive technical assistance under this section, including any failure in the development or dissemination of any technical assistance manual authorized by this section.

§ 12207. Federal wilderness areas

(a) Study

The National Council on Disability shall conduct a study and report on the effect that wilderness designations and wilderness land management practices have on the ability of individuals with disabilities to use and enjoy the National Wilderness Preservation System as established under the Wilderness Act (16 U.S.C. 1131 *et seq.*).

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[1] So in original. Probably should be "of".

(b) Submission of report

Not later than 1 year after July 26, 1990, the National Council on Disability shall submit the report required under subsection (a) of this section to Congress.

(c) Specific wilderness access

(1) In general

Congress reaffirms that nothing in the Wilderness Act [16 U.S.C. 1131 et seq.] is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area in order to facilitate such use.

(2) "Wheelchair" defined

For purposes of paragraph (1), the term "wheelchair" means a device designed solely for use by a mobility-impaired person for locomotion, that is suitable for use in an indoor pedestrian area.

§ 12208. Transvestites

For the purposes of this chapter, the term "disabled" or "disability" shall not apply to an individual solely because that individual is a transvestite.

§ 12209. Instrumentalities of the Congress

The General Accounting Office, the Government Printing Office, and the Library of Congress shall be covered as follows:

(1) In general

The rights and protections under this chapter shall, subject to paragraph (2), apply with respect to the conduct of each instrumentality of the Congress.

(2) Establishment of remedies and procedures by instrumentalities

The chief official of each instrumentality of the Congress shall establish remedies and procedures to be utilized with respect to the rights and protections provided pursuant to paragraph (1).

(3) Report to Congress

The chief official of each instrumentality of the Congress shall, after establishing remedies and procedures for purposes of paragraph (2), submit to the Congress a report describing the remedies and procedures.

(4) Definition of instrumentality

For purposes of this section, the term "instrumentality of the Congress" means the following:,[1] the General Accounting Office, the Government Printing Office, and the Library of Congress,.[1]

(5) Enforcement of employment rights

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any employee of an instrumentality of the Congress who alleges a violation of the rights and protections under sections 12112 through 12114 of this title that are made applicable by this section, except that the authorities of

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1 So in original. The comma probably should not appear.

the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(6) Enforcement of rights to public services and accommodations

The remedies and procedures set forth in section 2000e-16 of this title shall be available to any qualified person with a disability who is a visitor, guest, or patron of an instrumentality of Congress and who alleges a violation of the rights and protections under sections 12131 through 12150 or section 12182 or 12183 of this title that are made applicable by this section, except that the authorities of the Equal Employment Opportunity Commission shall be exercised by the chief official of the instrumentality of the Congress.

(7) Construction

Nothing in this section shall alter the enforcement procedures for individuals with disabilities provided in the General Accounting Office Personnel Act of 1980 and regulations promulgated pursuant to that Act.

§ 12210. Illegal use of drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall be construed to exclude as an individual with a disability an individual who—

(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(3) is erroneously regarded as engaging in such use, but is not engaging in such use; except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs; however, nothing in this section shall be construed to encourage, prohibit, restrict, or authorize the conducting of testing for the illegal use of drugs.

(c) Health and other services

Notwithstanding subsection (a) of this section and section 12211(b)(3) of this title, an individual shall not be denied health services, or services provided in connection with drug rehabilitation, on the basis of the current illegal use of drugs if the individual is otherwise entitled to such services.

(d) "Illegal use of drugs" defined

(1) In general

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or other provisions of Federal law.

(2) Drugs

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

§ 12211. Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include—

(1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

§ 12212. Alternative means of dispute resolution

Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this chapter.

§ 12213. Severability

Should any provision in this chapter be found to be unconstitutional by a court of law, such provision shall be severed from the remainder of this chapter and such action shall not affect the enforceability of the remaining provisions of this chapter.